No. 88-1854

In The

Supreme Court of the United States

October Term, 1988

Charles E. Strickland, Superintendent,
Florida State Prison,
Petitioner,

v.

David Leroy Washington,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Former Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTIONS PRESENTED

1. Whether the en banc decision of the former Fifth Circuit Court of Appeals improperly substituted a new standard of its own preference for determining ineffective assistance of counsel claims for the outcome determinative test employed by the Florida courts?

2. Whether the decision of the former Fifth Circuit violates the statutory limits of habeas corpus review and fundamental principles of federalism by encroaching upon the legislative authority of the state courts to interpret and enforce the state's carefully crafted capital sentencing procedure?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1554

CHARLES E. STRICKLAND, Superintendent,
Florida State Prison,
Petitioner,

v.

DAVID LEROY WASHINGTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Former Fifth Circuit

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Supreme Court Rule 42 for leave to file the annexed brief *amicus curiae* in support of Petitioner's position in the case at bar. Petitioner consented to WLF's participation, but counsel for Respondent refused.

The Washington Legal Foundation is a nonprofit public interest law firm organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than

85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological and financial impact crime has on its victims, their families, and society has led to the establishment of its Crime Victims Program, Death Penalty Project, and Court Watch Project. These programs are designed to advance the rights of crime victims and law-abiding citizens whose interests are too often ignored by the institutions which administer the criminal justice system. Among other activities, WLF provides legal assistance, guidance, and educational materials to the victims of violent crime and their families and participates in court cases with broad public interest implications.

As part of its Death Penalty Project, WLF has appeared as *amicus curiae* in the following death penalty cases before this Court: *Barefoot v. Estelle*, 51 U.S.L.W. 5189 (July 6, 1983); *Enmund v. Florida*, —— U.S. ——, 102 S. Ct. 3368 (1982); *Zant v. Stephens*, —— U.S. ——, 102 S. Ct. 1856 (1982); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Foundation is also presently participating in a death penalty case before the United States Court of Appeals for the Fifth Circuit, *O'Bryan v. Estelle*, No. 82-2422 (5th Cir. 1982).

In addition, WLF attorneys have testified before the U.S. Congress on capital punishment issues, *see, e.g.*, *Hearings on H.R. 5679 Regarding A Federal Death Penalty Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of the Washington Legal Foundation), and regularly debate opponents of capital punishment in a variety of public forums.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the pub-

lic by addressing some of the broader legal and policy issues implicated in determining the appropriate standard to evaluate ineffective assistance of counsel claims in habeas corpus proceedings. The decision here will ultimately affect the right of State legislatures, courts and juries to impose and enforce capital sentences. Years have passed since David Leroy Washington was convicted and sentenced to death for three of the most brutal murders in Florida history. In this regard, the case at bar is typical of all recent capital punishment litigation in which the States' interest in the finality of their judgments has been consistently and blatantly undermined by endlessly imaginative federal appeals.

The Washington Legal Foundation can bring to this case a perspective not presently represented. Accordingly, the Foundation respectfully requests permission to participate as *amicus curiae*.

Respectfully submitted,

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August 18, 1983

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

The interests of *amicus curiae* Washington Legal Foundation (WLF or Foundation) are set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae* Washington Legal Foundation adopts for the most part the recitation of facts in Petitioner's Brief. However, it is useful to recount the facts which are particularly material to the substantive legal and policy issues presented here.

On September 20, 1976, following carefully arranged plans, Respondent, David Leroy Washington, stabbed to death Daniel Pridgen, a minister, while an accomplice restrained the victim and covered his face with a pillow. Three days later, in the presence of three helplessly bound elderly sisters-in-law, Respondent murdered Mrs. Katrina Bi:k by stabbing her and shooting her in the head. Washington then attacked the sisters-in-law inflicting serious, permanent, and in one case, mortal injuries. Finally, on September 29, Respondent murdered Frank Meli, a twenty-year-old college student whom he had kidnapped two days before. While Meli was tied spread-eagled to a bed, Washington stabbed him eleven times. Although an accomplice had covered Meli's face with a pillow, Respondent stated he heard his victim repeat the Lord's Prayer over and over during the fatal attack.

After confessing and pleading guilty to the three murders, Respondent Washington was tried and convicted in the Dade County Circuit Court before Judge Richard Fuller. At the sentencing hearing on December 6, 1976, Judge Fuller sentenced Respondent to death on each of the three counts of first degree murder. While Respondent's attorney, William Tunkey, argued that Respondent's remorse and willingness to face the consequences of his crimes should persuade the court to impose life imprisonment, the judge found that the aggravating factors in the case overwhelmed any of the mitigating factors present.

Respondent collaterally attacked the judgment, citing a myriad of constitutional violations, all of which were dismissed in the Florida Circuit Court, the Florida Supreme Court, and the Federal District Court. It was only in the former Fifth Circuit Court of Appeals that one of Respondent's constitutional claims, ineffectiveness of counsel, was declared valid. This Court granted certiorari. 51 U.S.L.W. 3871 (June 6, 1983).

SUMMARY OF ARGUMENT

The former United States Court of Appeals for the Fifth Circuit improperly rejected the test developed by the courts of the State of Florida for evaluating ineffective assistance of counsel claims. The federal court's actions constitute both a blanket denial of the State's legitimate authority to develop such a standard for state prisoners and a thinly disguised effort to require an allocation of burden more in line with its own philosophical predilections. The test employed by Florida, as set forth in *Knight v. State*, 394 So.2d 997 (Fla. 1981), and reaffirmed recently in *Armstrong v. State*, 429 So.2d 287 (Fla. 1983), properly determines whether a sixth amendment violation is serious enough to require judicial remedy and focuses on the likelihood of impact on the outcome of the judicial proceedings. Therefore, it permits an assessment of whether Respondent received a full and fair adjudication of his claims.

Moreover, the lower court violated the statutory limits of habeas corpus review and established principles of our federalist system in reversing the denial of Respondent's petition for writ of habeas corpus. The court need not have considered Respondent's claim of ineffective assistance of counsel since the claim could have been dismissed on the doctrine of adequate state grounds. The component of prejudice, necessary to sustain Respondent's sixth amendment claim, is a matter interwoven in Florida's death penalty statutes and was thoroughly disproved in the state courts. This deliberate encroachment upon the authority of the Florida courts evidences a lack of respect for state judgments and undermines the principle of finality of litigation. It thereby diminishes the death penalty's value as a deterrent, devalues the efforts of the Florida bench, and contributes as a whole to the erosion of public confidence in the criminal justice system. If upheld, the Court of Appeals' unwarranted intrusion into Florida's enforcement of its criminal code can only serve as precedent for the continuing abuse of habeas corpus review of capital punishment cases.

ARGUMENT

I. THE EN BANC DECISION OF THE FORMER FIFTH CIRCUIT COURT OF APPEALS IMPROPERLY SUBSTITUTES A NEW STANDARD OF ITS OWN PREFERENCE FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR THE OUTCOME DETERMINATIVE TEST EMPLOYED BY THE FLORIDA COURTS

The en banc decision of the court below improperly substitutes a new formulation for determining ineffective assistance of counsel claims for the outcome determinative test of *Knight v. State*, 394 So.2d 997 (Fla. 1981), employed by the courts of the State of Florida. The new standard "articulated" in the majority opinion cannot be justified. The Florida Supreme Court possesses primary authority for developing a standard to evaluate claims of ineffective assistance of counsel. As this Court explained in *McMann v. Richardson*, 397 U.S. 759 (1970):

> [D]efendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we believe the matter . . . *should be left to the good sense and discretion of the trial courts* with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

Id. at 771. Based upon this express authority, the Florida bench has carefully developed and consistently applied the ineffective assistance of counsel standard set forth by its highest court in *Knight* and, absent fundamental error of a constitutional dimension in the application of that standard, a federal court lacks the authority to interfere with the state's decision. To hold otherwise sanctions

wholesale disregard of state court discretion. Moreover, it sets up the federal courts as super trial courts able to dictate every facet of a state court system's criminal justice policy on a case-by-case basis aided by 20-20 hindsight. Hence, the decision of the former Fifth Circuit Court of Appeals must be reversed.

A. The Outcome Determinative Test Set Forth In *Knight* Provides An Effective Means Of Assessing The Fundamental Fairness of Respondent's Sentencing And Serves To Appropriately Limit The Scope Of Habeas Corpus Relief

The Florida courts employ an appropriate and constitutionally sound test for adjudicating ineffective assistance of counsel claims. Expanding upon principles developed in *Meeks v. State*, 382 So.2d 673 (Fla. 1980), and *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979) (en banc), Florida carefully constructed a four-step test to determine whether a defendant has been denied reasonably effective assistance of counsel in *Knight v. State*, 394 So.2d 997 (Fla. 1981). The *Knight* test, as recently summarized with approval by the Florida Supreme Court, provides that:

> . . . the challenger must detail in his pleading the specific omission or overt act upon which the claim of ineffective assistance of counsel is based. Second, the defendant must show that the act or omission was a substantial and serious deficiency measurably below the standard of competent counsel. Third, the defendant must show that the deficiency, viewed under the circumstances, *probably affected the outcome of the proceeding*. Finally, the defendant's showing of substantial, prejudicial deficiency must withstand the state's attempt at rebuttal. Such rebuttal may be achieved by showing beyond a reasonable doubt that there was no prejudice in fact.

Armstrong v. State, 429 So.2d 287, 290 (Fla. 1983) (emphasis added). The Court of Appeals takes issue

with the third step of Florida's test; that is, the burden placed on the defendant to demonstrate the likelihood that the alleged ineffectiveness of counsel affected the outcome of the decision against him.

The majority chooses to substitute its own formulation of the appropriate ineffective assistance of counsel standard and in doing so draws a "bright constitutional line between what the Florida Supreme Court, several district courts in [the former Fifth] circuit, and other courts have found constitutionally acceptable." *Washington v. Strickland*, 693 F.2d at 1288 (Roney, J., dissenting). Specifically, the test it proffers would require the defendant to show that ineffective assistance of counsel resulted in "actual and substantial *disadvantage* to the course of his defense." *Id.* at 1262 (emphasis added). Upon a showing of "disadvantage", the ultimate burden of demonstrating that "any Constitutional error that did occur was harmless beyond a reasonable doubt" would then rest upon the State. *Id.*

The federal appeals court professes to base its new formulation on a recent explication by this Court of the prejudice portion of the "cause and actual prejudice" standard governing relief on collateral attack following procedural default at trial. *United States v. Frady*, 456 U.S. 152 (1982). *Frady* involved the collateral attack of a federal prisoner alleging erroneous jury instructions in a trial 19 years prior to which no contemporaneous objection was made. *Amicus* contends that such extrapolation is misplaced here and only confuses the instant issue by relying exclusively on case law involving guilt phase determinations rather than sentencing determinations.

Further, the en banc opinion of the former Fifth Circuit incorrectly characterizes the *DeCoster* and *Knight* burden allocation as imposing an overly harsh burden upon Respondent to prove that the sentencing decision would be different on retrial. *Washington v. Strickland*,

693 F.2d at 1261. The former Fifth Circuit selectively builds upon a dissenting opinion in *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978), which stated in pertinent part that "one suffering inadequate counsel need not show to receive a new trial that adequate counsel would change the result on retrial" and summarily declares that the *DeCoster* test requires such a showing. *Id.* at 1084. Contrary to the circuit court's allegation, *DeCoster* does not mandate such proof. *DeCoster* and *Knight* require only that petitioner establish the *possibility* that attorney error *harmed* the outcome of his trial. This burden is fundamentally different—and less difficult—than forcing the defendant to *prove* that the sentence imposed would have been more lenient.

The court below continues its deliberate assault on the Florida test by pointing out that the defendant "is no better situated than the State to demonstrate that . . . additional evidence was likely to alter the outcome of the case." 693 F.2d at 1262. Therefore, the court subjectively concludes that it would be somehow unfair to burden the defendant with any additional requirement:

> *We believe* that where the petitioner has shouldered the considerable burden of showing a violation of his sixth amendment rights that resulted in actual and substantial disadvantage to his case, it is inequitable to encumber him with the further responsibility of showing that the disadvantage determined the outcome of the entire case.

Id. (emphasis added). Thus, upon mere belief, akin to a gut feeling and unbuttressed by direct legal precedent, the federal appeals court rejects Florida's test for determining ineffective assistance of counsel and substitutes a new test which is apparently more in line with what it believes is necessary.

While recognizing that the state does not enjoy a superior vantage point in demonstrating likelihood of impact on outcome, the former Fifth Circuit fails to

offer a principled argument for relaxing the burden placed on petitioner. It requires only a showing of "actual and substantial disadvantage" to the course of the defense. 693 F.2d at 1263. *Amicus* fails to see where the en banc test differs substantially from the panel test which it so completely (and appropriately in our opinion) disparages. *Id.* at 1262. Holding petitioner to a showing of "substantial disadvantage" is simply a semantic inversion of the panel's formulation: "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him [to his advantage]." *Washington v. Strickland*, 673 F.2d 879, 902 (5th Cir. 1982). As such, it is subject to the same criticism set forth by this Court in *United States v. Valenzuela-Bernal*, 102 S. Ct. 3440 (1982): "To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." *Id.* at 3446.

A greater burden on Respondent is justified and the *Knight* standard of burden allocation essentially represents the State's reasonable efforts to stem the tide of unwarranted habeas corpus reversals. In the majority of cases, it is impossible to point with certainty to the precise role an attorney's substandard performance played in the outcome of the trial. Additionally, this Court has definitively found that certain violations of the right to counsel may be disregarded as harmless error. *United States v. Morrison*, 449 U.S. 365 (1981); *Chapman v. California*, 386 U.S. 18, 23 (1967). Thus, it cannot be an undue burden to require the habeas corpus petitioner to show at least a *likelihood* that attorney ineffectiveness has some impact on the outcome of the proceeding [1] and this is precisely what Florida's *Knight* test requires.

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[1] The *Knight* burden allocation standard is further consistent with case law requiring a much heavier burden of proof to support a collateral attack than that necessary for a direct appeal. *Bruce v. United States*, 379 F.2d 113 (1967); *United States v. Frady*, 456 U.S. 152, 165-66 (1982).

B. The Decision of the Former Fifth Circuit Court Of Appeals Is Too Dangerously Speculative To Warrant Acceptance By This Court

The former Fifth Circuit's formulation of an ineffective assistance of counsel test is too dangerously speculative to warrant acceptance by this Court. The lower court fails to practically or effectively define and limit "actual and substantial disadvantage" in a way which sufficiently forecloses endless and frivolous appeals. Instead, the circuit court baldly claims that the burden of showing disadvantage "is of sufficient magnitude to dis ourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance." 693 F.2d at 1262. *Amicus* submits that the recent history of death penalty litigation underscores the error of the lower court's assumption. "Disadvantage" is essentially an open-ended term devoid of objective boundaries and its adoption as a standard will not only serve to sanction judicial subjectivity as the basis of granting habeas corpus relief, but initiate a flood of ineffective counsel claims.

II. THE DECISION OF THE FORMER FIFTH CIRCUIT VIOLATES THE STATUTORY LIMITS OF HABEAS CORPUS REVIEW AND FUNDAMENTAL PRINCIPLES OF FEDERALISM BY ENCROACHING UPON THE LEGISLATIVE AUTHORITY OF THE STATE COURTS TO INTERPRET AND ENFORCE THE STATE'S CAREFULLY CRAFTED CAPITAL SENTENCING PROCEDURE

The Former Fifth Circuit traversed the parameters of habeas corpus review and breached fundamental principles of federalism by elevating the merits of Respondent's frivolous claim to expostulate an irrelevant treatise on the constitutional requirements of effectiveness of counsel. This Court, in defining the limits of habeas corpus review, recently acknowledged that:

> The states possess primary authority for defining and enforcing criminal law. . . . Federal intrusions

> into state criminal trials frustrate both the states' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.

Engle v. Isaac, 456 U.S. 101, 128 (1982). Yet, in recent years, the federal writ of habeas corpus has been so overextended that the judgments of state courts have been depreciated and the initiative of state court judges has been frustrated. The eagerness of federal courts to strike down state court determinations in order to expound their own theories of criminal justice has been time and again demonstrated. This proclivity of the federal courts is especially pronounced in capital punishment cases where federal collateral challenges to state court death sentences are accorded credence as a matter of course. If a state prisoner can convince even one federal judge to second guess the state court determinations below on any one of the myriad of constitutional claims that now routinely arise in a typical capital case, his conviction can be vacated. The Washington Legal Foundation contends that the overextension of habeas relief for state "death-row" defendants is epitomized by the en banc opinion of the former Fifth Circuit. WLF also submits that the decision is motivated by a mistrust of the ability of state court judges to provide fair and competent forums for the meaningful adjudication of federal rights and an ideological bias against the imposition of the constitutionally sound death penalty. Therefore, this Court should reverse the decision of the Court of Appeals.

A. The Fifth Circuit Erroneously Reversed the District Court's Denial of Habeas Corpus Relief Since Respondent's Constitutionally Guised Claim Was Properly Dismissed On Adequate State Grounds By The Florida Courts

Respondent's claim that his constitutional rights were violated through his counsel's failure to present nonstatutory mitigating evidence at the sentencing phase of his trial cannot be sustained absent a showing that the al-

leged omissions unduly and unfairly prejudiced his case. Even the former Fifth Circuit acknowledged in its opinion that a criminal defendant must demonstrate that the alleged act or omission of counsel prejudiced the defendant in order for it to rise to the level of constitutional error. *Washington v. Strickland*, 693 F.2d at 1264 n.33. *See also Washington v. Watkins*, 655 F.2d 1346, 1360 (5th Cir. 1981); *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980); *Beran v. United States*, 580 F.2d 324, 326 (8th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).[2] Thus, even if the omissions of Respondent's counsel at the sentencing phase of his trial are determined to have been inadequate, there *must still* be a showing that Respondent was unduly and unfairly prejudiced thereby. *Washington v. Watkins*, 665 F.2d at 1360.

The question of prejudice arising from the failure of Respondent's counsel to produce mitigating evidence is a question which is interwoven in Florida's substantive capital sentencing statutes and which was clearly considered and rejected by both the Florida appellate courts. Pursuant to Fla. Stat. Section 921.141 (Supp. 1976-1977), the trial court is to determine the sentencing profile of a criminal defendant convicted of first degree murder. The court examines and weighs the aggravating and mitigating circumstances surrounding the crime and the defendant in order to determine whether the death penalty should be imposed. Fla. Stat. Section 921.141(6).

[2] This Court has held that in some instances the prejudice component is presumed regardless of whether it was independently shown. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). However, *Holloway* involved a situation in which a trial court improperly required joint representation of co-defendants by one attorney over a timely objection and in effect deprived one of the defendants of the presence of counsel. When a defendant is deprived of the presence of his attorney in the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In the instant case, Respondent does not claim he was deprived of counsel, but that counsel ineffectively represented him.

The trial court discerns Florida's sentencing policy as it applies to each particular defendant through its knowledge of the language and legislative history of the death penalty statute as well as past sentencing decisions in cases presenting profiles similar to the defendant. *See Washington v. Strickland*, 693 F.2d at 1275 (Tjoflat, J., specially concurring).

The Florida Supreme Court has determined that the process of weighing aggravating and mitigating circumstances to formulate a criminal defendant's sentencing profile as categorized in Fla. Stat. Section 921.141 is a matter of *substantive* state law. *Morgan v. State*, 415 So.2d 6, 11 (Fla. 1982). In *Morgan*, petitioner argued that Section 921.141 seeks to regulate matters of criminal trial and procedure which are exclusively the province of the Supreme Court of Florida under the rulemaking power assigned to it by Article V, Section 2(a), Fla. Const. The State Supreme Court disagreed and held that the aggravating and mitigating circumstances of the statute (Section 921.141), when read in conjunction with Fla. Stat. Sections 782.04 and 794.01, actually *define* those crimes to which the death penalty is applicable or inapplicable. *Id.* Thus, it follows that any question of prejudice arising from an attorney's failure to introduce evidence that would qualify as a nonstatutory mitigating circumstance is a question of determining the effect the omitted evidence would have on the original sentencer, and hence a matter of state substantive law. For these reasons, *amicus* contends that the determination of prejudice is strictly reserved to state courts in collateral attacks on a death penalty sentence on the basis of ineffectiveness of counsel.

The record in the case at bar demonstrates that Respondent's claim of prejudice was thoughtfully and thoroughly disposed of at the state level. In accordance with the applicable state statutes and case precedent, the Florida Circuit Court imposed three sentences of death for the three

brutal murders for which Respondent had been convicted. The death sentences were upheld on direct statutory appeal. *Washington v. State*, 362 So.2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). Respondent's post conviction motion incorporated all the mitigating evidence that he alleged was incompetently omitted at his sentencing hearing. The Florida circuit court, *assuming that allegations of Respondent's motion and the affidavits he presented in mitigation were true*, found that he nonetheless failed to establish a prima facie showing of prejudice. The court held that:

> As a matter of law, the record affirmatively demonstrates beyond any doubt that even if Mr. Tunkey [Respondent's counsel] had [presented the new mitigating evidence] at the time of sentencing, there is not even the remotest chance that the outcome would have been different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming* and even to this date the [Respondent] cannot show that any statutory mitigating circumstances which he claims his attorney failed to investigate and present at the time of sentencing would as a matter of law, be insufficient to outweigh the multiple aggravating circumstances present in this case.

Washington v. Strickland, 693 F.2d at 1267.

On appeal, the Florida Supreme Court rejected the necessity of a hearing and affirmed the lower court's decision, finding that Respondent had failed to make a prima facie showing of possible prejudice and failed to such a degree the court believed "*to a point of moral certainty*" that Washington was entitled to no relief. *Washington v. State*, 397 So.2d at 287 (emphasis added). From a review of these proceedings, it is clear that the Florida courts, intimately aware of their own state's sentencing policy, properly dismissed Respondent's claim of prejudice.

The Fifth Circuit, in reversing the denial of Respondent's petition, usurped Florida's legitimate role as the administrator of its death penalty statute and breached established principles of federalism since the claim of ineffectiveness of counsel was resolved on adequate state grounds in the Florida courts. A state prisoner is only entitled to habeas corpus relief if he or she is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. Section 2254 (1948). In *Henry v. Mississippi*, 879 U.S. 443 (1964), this Court held that federal courts should decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. *Henry* involved an issue of state criminal *procedure*—whether a failure to make a contemporaneous objection to the admission of evidence caused a loss of Henry's right to challenge the illegal seizure of the evidence. This Court distinguished *Henry* by noting that, "where the ground involved is *substantive*, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand . . . we have no power to revise judgments on questions of state laws."[3] *Id.* at 446-47 (emphasis added). Since the normative decision of the state courts that death was the appropriate sentence for Respondent based on his sentencing profile is binding on federal courts, the former Fifth Circuit faced with the same sentencing profile, should have ruled that Respondent could not possibly sustain his claim of prejudice and dismissed the petition for failure to state a claim for re-

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[3] In *Wainwright v. Sykes*, the Court adopted a "cause" and "prejudice" test to determine the extent to which *procedural* default in the state courts will preclude a federal habeas corpus consideration of an issue affected. However, this Court upheld the doctrine of adequate and independent state grounds as a "well established principle of federalism" and stipulated that "a state decision resting on adequate foundation of state *substantive law* is immune from review in the federal courts." 433 U.S. 72 at 81 (1977) (emphasis added).

lief. *See Washington v. Strickland*, 693 F.2d at 1279 (Tjoflat, J., specially concurring).

B. Public Interest Concerns Dictate The Reversal Of The Circuit Court's Decision To Grant Respondent Habeas Corpus Relief

The en banc decision of the former Fifth Circuit overstepped the boundaries imposed by the federal habeas corpus statute, 28 U.S.C. § 2254, and failed to accord proper deference to the judgments of the Florida courts and the state's interest in the finality of those judgments. As a result, the decision diminishes the death penalty's value as a deterrent, undermines the morale of Florida judges, and contributes to the erosion of public confidence in the criminal justice system.

Justice Powell stated in *Schneckloth v. Bustamonte*, 421 U.S. 218 (1973) (Powell, J., concurring) that:

> At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view for resurrecting every imaginable basis for further litigation.

Id. at 262. However, frequent abuse of habeas corpus relief clearly results in a population of prisoners who never confront the fact of their guilt or the inevitability of punishment for their crimes. As presently employed, federal collateral review of a conviction too often serves only to extend the ordeal of the trial for both society and the accused and frustrates legitimate state and societal expectations of justice by undermining the principles of finality of litigation. *See Engle v. Isaac*, 456 U.S. 107, 126-127 (1982).

The instant case serves as a good example. No question exists as to Respondent's guilt or to the heinous nature of the crimes which led to the imposition of his capital sentence. Nonetheless, his identical claims were reviewed

and re-reviewed by a number of courts until one tribunal finally accepted the oft-rejected arguments. Tolerating such extensive efforts to undo valid state judgments lends force to the proposition that a criminal conviction is *never* final until the creativity of a convict or his counsel is thoroughly exhausted. As a result, the appeals process in capital cases now moves in glacial time.

The former Fifth Circuit has helped to endlessly prolong the imposition of Respondent's sentence and, concomitantly, diminish the value of the Florida death penalty statute as a deterrent. This Court has described the Florida death penalty statute as intending, "to provide maximum deterrence [and] fair warning of the degree of culpability which the state ascribe[s] to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 297 (1977). However, deterrence depends upon the expectation that those who violate the law will swiftly and surely become subject to just punishment after reasonable review of claims of constitutional irregularity. By refusing to give deference to the four Florida court proceedings that determined both Respondent's guilt and appropriate sentence (as well as a similar proceeding in the federal district court), the Court of Appeals contributes to and, more importantly, exacerbates, the "death-row log jam" that makes such a mockery of capital punishment today.

Furthermore, the lower court undermines the morale of state judges as a whole in resurrecting Respondent's ineffectiveness of counsel claim. In *Engle v. Isaac, supra*, Justice O'Connor explicitly recognized the deleterious effect of such unnecessary federal court intervention in state criminal justice processes:

> Over the long term, . . . , federal intrusions may seriously undermine the morale of our state judges. As one scholar has observed, there is "nothing more subversive of a judge's sense of responsibility, or the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging

> well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, n.32, at 451. Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own.

456 U.S. at 128 n.33.

The effect here is two-fold. First, by nullifying state judicial discretion, the federal courts stifle healthy experimentation on the state court level. It has long been recognized that one of the distinct advantages of our federal system is that a single courageous state may serve as a laboratory for testing novel solutions to the social and economic challenges facing government bodies. Experiments on the state level which do not work can be more easily changed than those instituted on the national level and successful experiments can be readily adopted by other states on a firmer basis.

The comprehensive death penalty statute enacted by the legislature of Florida and applied by its courts is an expression of the principled public policy of the state regarding the appropriate punishment due in certain circumstances and represents a good faith (and successful) effort to meet the commands of this Court and the interests of the criminal defendant. *See Armstrong v. State*, 429 So.2d 287 (Fla. 1983). Such responsible efforts to fight crime and deter criminal conduct by state courts should be encouraged rather than dismissed on the federal level. Moreover, it must be borne in mind that state court judges, no less than their federal counterparts, take an oath to support and defend the United States Constitution. No reason exists to presume that state judges are any less committed or less sensitive to constitutional guarantees due the criminal defendant than federal judges. *See Younger v. Harris*, 401 U.S. 37 (1971).

Secondly, the absence of finality and increasing federal intrusion result in the erosion of public confidence in the criminal justice system. As the Chief Justice of the Su-

preme Court of Alabama argued, "we cannot expect the public to give any state court system the maximum respect and support it needs when the decisions of the highest court of the state are routinely subject to being reviewed and overturned by a single federal court judge. . . ." Torbent, C.J., Statement before the Subcommittee on Courts of the U.S. Senate Committee on the Judiciary in Support of Senate 653 (December 1981). So long as state judgments do not command the respect of federal courts, *amicus* submits they cannot command the respect of the public. The overextension of the writ of habeas corpus engenders disrespect for the criminal justice system as a whole as well as for state court systems. It reinforces the pervasive belief among state judges, lawyers, and the public at large that, due to the existence of Section 2254, state death sentences are merely a "tryout on the road" for what will later be the "main event"—the determinative federal habeas proceeding. *Wainwright v. Sykes*, 433 U.S. at 90.

Finally, it is instructive to return to the historical foundations of the Great Writ in order to more fully understand the abuses to which it is being subjected. The writ of habeas corpus was originally intended to be an extraordinary writ utilized on those *rare* occasions when necessary to correct procedural flaws in the *system* of justice rather than to be routinely employed as a second mode of appeal to correct alleged flaws in the *judgment* of counsel. Recent decisions of this Court have also recognized the imperative to restrict the overextension of federal habeas corpus review.[4]

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[4] There were nearly 7,800 habeas filings by state prisoners in federal courts in the year ending June 1981. This figure does not take into account the number of appeals filed in the federal appellate courts from denials by the federal district courts. Remarks of the Honorable William French Smith, Attorney General of the United States, to the Conference of Chief Justices, January 30, 1982. Clearly such a swelling of federal court dockets has the real

[Footnote continued]

Habeas relief should be reserved only for the most deserving defendants with a focus on whether the individual petitioner deserves relief for the most exigent of reasons. *Wainwright v. Sykes*, 433 U.S. 72 (1977) (relief to prevent a true "miscarriage of justice"); *United States v. Williams*, 544 F.2d 1215 (4th Cir. 1976) (relief viewed as exercise of "extraordinary power which must be regarded as an exception to the rule"). The same founding fathers who expressly mentioned the Great Writ in the Constitution also firmly chose federalism as the dominant structure of our government. Clearly, overextension of the writ to include circumstances for which it was never intended will in the long run serve to weaken both the writ itself and our system of criminal justice. Hence, a substantial number of duplicative, overlapping and repetitive reviews of state criminal decisions in the federal courts, a fact of life at present, unduly prolong and improperly call into question state criminal proceedings without furthering the historic purposes of the writ.

For all of these reasons, *amicus curiae* Washington Legal Foundation submits that sound public interest considerations dictate the reversal of the Court of Appeals decision to grant Respondent habeas corpus relief. Rejecting the findings of four state courts and the federal district court in order to expostulate its own longwinded constitutional theory of ineffectiveness of counsel, the court's action typifies the abuse of Section 2254 review of capital punishment cases and the tremendous burden it places on the entire criminal justice system. Justice Powell recently told what was formerly the same circuit that such an abuse of process is a "malfunction of our system of justice." He emphasized that unwarranted federal court intrusion:

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potential for eroding the quality of justice. Further, the ever-increasing number of meritless petitions for habeas corpus relief only serves to bury the more meritorious claims and creates a disincentive for courts to separate such petitions from the rest of the pile.

> disserves the public interest in the implementation of lawful sentences [and] undermines public confidence in our system of justice and the will and ability of the courts to administer it.

Eleventh Circuit Conference, Savannah, Georgia, May 8-10, 1983. This Court must finally put a stop to the "malfunction" of our justice system. The time has come for this Court to signal that law-abiding members of society, as well as the criminals, have rights which deserve adequate protection.

CONCLUSION

For all of the foregoing reasons, the Washington Legal Foundation submits that this Court should reverse the ruling of the former Fifth Circuit Court of Appeals.

Respectfully submitted,

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August 18, 1983

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* The Washington Legal Foundation wishes to express its profound appreciation to legal interns Mary Jo George and Daniel J. Kelly whose efforts were instrumental in the preparation of this brief.